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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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No. 80-6701

****

DANIEL ROSS,

Petitioner

v.

AMOS REED, Warden,
ET AL.,

Respondents

****

BRIEF OF THE RESPONDENTS, AMOS REED, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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OPINION BELOW

JURISDICTION

QUESTIONS PRESENTED

Pursuant to Rule 34 of the Rules of the Supreme Court, these items are omitted.

LEGAL PROVISIONS

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense.

United States Constitution, Amendment XIV. No state shall... deprive any person of life, liberty or property, without due process of law....

NCGS §1-180. Judge to explain law, but give no opinion on facts. -- No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall

give equal stress to the State and defendant in a criminal action.

Rule 28(a). Briefs: Function and Content

(a) Function. The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

STATEMENT OF THE CASE

This petition seeks review of the denial of an application for a writ of habeas corpus by the United States District Court for the Eastern District of North Carolina, Honorable Franklin T. Dupree, Judge Presiding, Ross v. Reed, 78-62-HC, dismissed 23 October 1980. The United States Court of Appeals for the Fourth Circuit affirmed the District Court on 1 April 1981 in an unpublished decision, Ross v. Reed, 80-8344. The underlying criminal case is a first degree murder conviction obtained in the Superior Court of Wake County North Carolina in March 1969, case number 68 CR 4266, affirmed on appeal, State v. Ross, 275 NC 550, filed 15 October 1969. The issues in this petition are procedural and arose during the course of the federal proceedings. As they deal with federal habeas corpus law, however, there has been no occasion and will be none for the state courts to deal with them. The substantive issues to which they relate were presented in a state court post-conviction proceeding on December 2, 1977 but this was denied on December 29, 1977 and appellate review

was declined on January 9, 1978.

STATEMENT OF THE FACTS

Petitioner was tried for and convicted of first degree murder, the elements of which in North Carolina are the usual ones - the unlawful killing of another with premeditation, deliberation and malice. The state's case showed that he shot and killed his wife in the course of the second of two separate shooting incidents separated by his leaving the room where the killing occurred, going outside to reload his weapon, then returning to the place of the killing. Petitioner's evidence was that if he killed, he did so in self-defense for he shot at his wife after she had slashed him with a knife and later shot her boyfriend who approached him with something in his hand and at that time possibly hit his wife unintentionally rather than the boyfriend who was the actual assailant. He also claimed the unrecognized offense of "irresistible impluse". The trial judge, Honorable Leo Carr, charged that petitioner was presumed innocent and that the state had the burden of proof in the case. In conjunction with his instructions on second degree murder, Judge Carr charged that:

> The court instructs you that murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.
>
> Malice is not only hatred, ill-will or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse or justification. It may be shown by evidence of hatred, ill-will or dislike and it is implied in law from the intentional killing with a deadly weapon; and a pistol or a gun is a deadly weapon. (R p 36).
>
> *****
>
> Now in respect to [whether or not he is guilty of murder in the second degree] the court instructs you that in a case where a person is killed as a result of a gunshot wound fired intentionally but where the state has satisfied you beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon and that such assault caused her death there are two presumptions that arise in

favor of the state: One, that the killing was unlawful; Two, that it was done with malice; and the burden then shifts to the defendant under those circumstances to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but to satisfy the jury that the killing was not done with malice if he would acquit himself of a charge of murder in the second degree... (R p 42)

Judge Carr then continued with regard to self-defense in the event the jury found that petitioner killed his wife on the first occasion he shot at her:

....if he would exonorate himself and show that the killing was not unlawful then the burden of proof is upon him to satisfy the jury, as the court has indicated not beyond a reasonable doubt nor by the greater weight of the evidence but to satisfy the jury that the killing was done under some, for some reasor recognized by the law as justifiable; and here he relies on self-defense; contends that you should find that he did not kill her except in his proper self-defense within the meaning of that term as it has been defined to you by the court. (R p 42)

This was followed by an instruction in the event the jury found petitioner killed his wife on the second occasion he fired the pistol:

If you find that he did not shoot at his wife and shot at McAllister, then the court instructs you that the burden would be upon the state to satisfy you under those circumstances beyond a reasonable doubt that he intentionally assaulted McAllister if he shot at McAllister with a deadly weapon, to wit: a pistol and he had no lawful right to do so, and in doing so, the bullet hit his wife, then he would be guilty if the state has satisfied you beyond a reasonable doubt that he shot at McAllister trying to hit him and did it with malice and did not under circumstances showing that he did not have the right to do it under the doctrine of self-defense as that term has been defined and explained by the court, then in that event he would be guilty of murder in the second degree. If you are satisfied beyond a reasonable doubt that he shot at McAllister with no lawful right to do so and with no - under those circumstances that made - that did not make the doctrine of self-defense between him and McAllister apply in the case, then under those circumstances it would be your duty, if you find those to be the facts and you were satisfied of those facts beyond a reasonable doubt, the burden being upon the state to so satisfy you he would be guilty of murder in the second degree, and under those circumstances in that particular connection, that in his explanation of his shooting at McAllister, if the State has satisfied you - failed to, to satisfy you beyond a reasonable doubt that he did shoot at McAllister and did it with malice then under those circumstances he would not be guilty

> of murder in the second degree under those circumstances. (R p 47)

Judge Carr later concluded by his charge again putting the burden of proof on the state with regard to both second degree murder and self-defense in the event petitioner was found to have shot his wife while defending himself against McAllister, while putting the burden of proof on petitioner to satisfy the jury of self-defense in the event that they found he killed his wife during the course of his first assault. (R p 51).

Objections were not taken at trial to the instructions, however, there was no state law requirement at that time that instructions on major points of law in a case had to be objected to at trial in order for them to be reviewed on appeal. Additionally, the instructions were not assigned as error on appeal insofar as the burden of proof was concerned for, under the law of North Carolina at the time, the burden of proof was properly placed on the petitioner. However, the tenth Assignment of Error related to self-defense instructions and was as follows:

> (10) ASSIGNMENT NO. 10 The court below erred in failing to apply the law to the evidence as required by North Carolina G.S. §1-180 in that it did not properly charge the jury as to the doctrine of self-defense, being asserted by the defendant, i.e., that the defendant was in a place where he had a legal right to be; that the defendant was without fault in bringing on the difficulties; that the deceased had ill-will toward him; and that the deceased advanced on him and stabbed him.

The briefs are not a part of the record in this case and it is unclear from the Supreme Court's opinion whether or not this assignment was carried forth in the brief as the court states in its opinion that "the defendant did not point out and assign as error any particular or designated protion of the charge as required by the appellate rules", State v. Ross, 275 NC 550 (1969). This is somewhat ambigious in that it could mean either that

nothing about the instructions was brought forth for argument or that something was brought forth but not in accordance with the rules. Ordinarily, either would result in a "abandonment" of an issue under North Carolina's Rules of Appellate Procedure, Rule 28(a). This, in turn, would cost petitioner his state remedy, as matters of record which could be reviewed on appeal may not be reviewed in a post-conviction proceeding, State v. White, 274 NC 200 (1964). However, in the course of its opinion, the Supreme Court, while discussing petitioner's argument that the court erred in failing to submit the possible verdict of involuntary manslaughter, stated that Judge Carr "charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty" and that despite the fact "the defendant did not point out and assign as error any particular or designated portion of the charge..., we have examined the charge and conclude that it is in accordance with legal requirements and is unobjectionable", Id. at 554.

In February 1979, petitioner then challenged his conviction in the federal court habeas action which forms the basis of this petition. His particular contention was:

> The court charged the jury "there are two presumptions that arise in favor of the state: One, that the killing was unlawful; Two, that it was done with malice; and the burden then shifts to the defendant, etc. (R p 42). Hence placed upon the petitioner burdens of proof later held by the United States Supreme Court to be violative of due process, Mullaney v. NC, 421 US 684 (1966) which ruling was given retroactive effec effect in Hankerson v. NC, 421 US 684 (1977) and appears at (R p 42). [sic]

His traverse in the federal action also raised the matter of burden of proof on self-defense. Both issues had been raised in his post-conviction application but review of them had been denied because the application "...stated no grounds for relief under the post-conviction act". Respondents pled as defenses against these claims procedural

forfeiture resulting from the failure to raise the issues on appeal and, in conjunction with the presumptions, that they were permissible under Mullaney v. Wilbur, 421 US 684 (1975) and did not affect the outcome of petitioner's case because they were used in conjunction with the charge on second degree murder of which petitioner was not convicted. On petitioner's motion, his case was held in abeyance pending decision in a Fourth Circuit case in which the validity of respondent's procedural default argument was at issue. When that decision was finally made, it upheld respondent's procedural forfeiture argument. Petitioner then filed a supplemental pleading by which he contended that the North Carolina Supreme Court's statements, mentioned above in conjunction with his claim that involuntary manslaughter should have been the subject of a charge, were in fact a ruling on the subject matter of his complaint and therefore prevented a forfeiture.

REASONS THE WRIT SHOULD NOT ISSUE

The writ should not be granted to review petitioner's Issues A and C - forfeiture and the meaning of the Wainwright v. Sykes cause and prejudice exception - because the court has previously declined to grant it in Cole v. Stevenson, _____ US _____, 66 LEd 2d 301 (November 17, 1980) to review the decision by the United States Court of Appeals for the Fourth Circuit in that case, 620 F.2d 1140 (1980). Cole involved the same issues as this case and the decision in this case is based on it. In Cole, Mr. Nakell was also the attorney for the inmate; the undersigned represented the respondents; and there was agreement between the parties that the issues were reasonably important and the subject of a two - one conflict in the circuits, compare Berrier v. Egeler, 583 F.2d 575 (6th Cir. 1978) with Evans v. Magio, 557 F.2d 430 (5th Cir. 1977) and Cole v. Stevenson, supra. Nothing has changed since that time except the court now has these

issues before it in Engle v. Issac, 80-1430, 29 CrL 4021 on what appear to be similar facts, although as pointed out by petitioner, the procedural default argued in that case may involve an at-trial action rather than failure to present the issue on appeal.

The writ should not be granted to review petitioner's Issue B - ineffective assistance of counsel - because this issue was also raised in Cole and found not not worthy of review there. This is because it is elementary that an lawyer is not ineffective for failing to anticipate changes in the law, see e.g. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), Haywood v. Stone, 527 F.2d 256 (9th Cir. 1975), Gillihan v. Rodriguez, 551F.2d 1182 (8th Cir. 1977) and certainly this would be the case here, as even In Re Winship, 397 US 358 (1970) on which Mullaney v. Wilbur, supra, was based had not been decided at the time of the appellate decision in petitioner's case on 15 October 1969 and it was not made clear until years later in Sandstrom v. Montana, 442 US 510 (1979) that Winship affected the presumptions involved in this case.

The writ should not be granted to review petitioner's Issue D - the North Carolina Supreme Court's alleged review of petitioner's question even though it was not raised there - because it is frivolous. As Judge Dupree found at the District Court level, there is simply no basis on which it can be concluded that the North Carolina Supreme Court considered the question of the applicability of a then undecided constitutional principle and whether or not it necessitated a change in North Carolina state law. Reference to Stern and Gressman, Supreme Court Practice, p. 222, 223 (5th Ed. 1978) shows that this is correct for there it is said:

> Where the highest state court assumes or holds the federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state court disappears.....

*****

> A written opinion filed by the highest state court is part of the record before the Supreme Court. It is of obvious importance in determining whether the state court actually considered the federal question to be raised by it.... The majority of opinion, if it is to be helpful in this connection, must explicitly or implicitly recognize the presence of a federal question and render a decision thereon.

It is obvious that the above could not have occurred in this case.

Nothing petitioner argues to the court in support of his petition changes the above. First, the Fourth Circuit in Cole v. Stevenson does not seem to respondent to have held or stated that Fay v. Noia, 372 US 361 (1963) was overruled by Wainwright but only that Wainwright, as opposed to Fay, applied to the facts of this case. This is unremarkable because in Fay, the basis of the decision was that the prisoner lost his state appellate remedy because he was coerced into giving it up in its entirety, and in petitioner's case he made use of his state appellate remedy rather than being coerced into giving it up. Second, the fact that petitioner felt an objection would not have been honored in state court is of no particular importance for in such cases as McMann v. Richardson, 397 US 759 (1970), Estelle v. Williams, 425 US 510 (1976) the lawyers involved likewise thought this but failed to object without any review - saving consequences. Third, petitioner's assertion that "....the State Supreme Court thus denied petitioner's appeal on this issue on the merits and not on the basis of procedural default" begs the question because from all appearances there was no issue raised by petitioner on this matter in that court. Fourth, the reliance on a conflict in the circuits on the sufficiency of cause for the exception to Wainwright to operate is misplaced because that conflict does not appear to be based on an interpretation of Wainwright but instead appears to stem from a conflict in the circuits on what constitutes ineffective assistance

of counsel. The Fourth Circuit, in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) has shifted its focus from the trial as a whole to the particular error asserted, with its concern being whether or not it was "so flagrant that a court could conclude that it resulted from negligent or ignorance rather than from informed, professional deliberation", Id. at 544 . However, the other two circuits whose holdings are claimed to conflict with that of the Fourth Circuit, still have tests relating to ineffective assistance of counsel which deal with the trial as a whole - the "reasonably effective counsel" standard, see cases cited in the dissent to the denial of certiorari in Marzullo, 435 US 1011 (1978). This has resulted in the unusual concept in those circuits of a non-Sixth Amendment ineffectiveness of counsel which, of course, should someday be rejected by the court. However, that issue is only tangentially presented by petitioner's application and by this case as a whole. Therefore, petitioner's arguments should not be accepted as a basis for the exercise of the Court's discretion to review this case.

CONCLUSION

For the reasons set out above, respondents urge that the Court not issue a writ of certiorari to review the decisions previously made in this case.

This 4 day of August, 1981.

Respectfully submitted,

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